

Declaration of Rod Underhill

COMES NOW, Rod Underhill, attorney at law, who declares as follows:

**Background**

I have been a member of the State Bar of California since 1980. I was a co-founder of MP3.com, an Internet-based technology and entertainment company. I am also a co-author of two books: The Complete Idiot's Guide to MP3: Music on the Internet, and the Complete Idiot's Guide to Making Millions on the Internet. After leaving MP3.com, I served as a law professor at the Thomas Jefferson School of Law for two years. I have served as a judge (pro tempore) of the San Diego Superior Court for 15 years. I have also devoted much of my time to fostering start-up companies, including Telomolecular Nanotechnologies, Inc, and NIMBIT.

I understand that this declaration will be submitted to the U.S. Patent and Trademark Office as evidence of the novelty and non-obviousness of a patent application being pursued by Michael Sharp. Beyond the exchange of one or two casual phone calls, I have had no contact with Michael Sharp, and I have never had any relationship or affiliation with Michael Sharp or AMP3.com.

I offer consulting services for start-ups and venture capitalists, at an agreed-upon fixed fee or a normal hourly rate of \$300/hr. For my time in reviewing my book and other materials to refresh my memory and prepare this declaration, I expect to be paid roughly \$1000.

**Qualifications**

In 1998, I co founded a technology company entitled MP3.com, Inc. "MP3.com," as the business was popularly known, was a company that primarily provided for the collection and distribution, though digital downloading of music in the MP3 compression format, of over a million songs. While our artist community was nearly completely comprised of unknown artists, we did represent many famed musicians, such as David Bowie, Madonna, Tom Petty, Billy Idol, Ice-T, TLC, The Beach Boys, The Offspring, and many other internationally famed acts. MP3.com enjoyed an astoundingly successful 6.9 billion dollar public offering, and it was later successfully merged with Vivendi-Universal.

Although as a co founder of MP3.com, my duties were somewhat varied in nature, I reported directly to the CEO of MP3.com on a variety of crucial issues. I spent a considerable amount of my time analyzing the business models of all potential competitors. The creation of MP3.com business models was one of my primary responsibilities and I both reported directly to the CEO and also worked directly with him regarding the conceptualization and development of our business models.

After our successful IPO, I created our first true business model: a copyright wizard by which our artists could easily complete and file copyright registration forms via MP3.com, complete with duplicate copies of the songs being registered. This was an extremely valuable business model generating more than a million dollars per month for MP3.com. We possessed one additional business model that I jointly developed with MP3.com's CEO: a system of providing additional benefits to our artist community. We, however, continued to seek additional revenue models that matched our technological guidelines and related requirements.

Another part of my duties at MP3.com involved identifying company needs and formulating the specifications for systems to fill those needs. I routinely worked with our engineers to formulate formal engineering proposals for those systems, and I would normally operate the system and train others once

pursue additional revenue streams. We, therefore, concluded that we could abstain from embedding commercials into our own digital downloads for the time being. Nevertheless, we anticipated that AMP3.com's embedded commercial concept would come into its own by 2006-2007. This is one of the reasons I covered AMP3.com in my book and the reason I gave AMP3.com a relatively large amount of attention, mentioning the company in two separate sections of my book on MP3-related technology and businesses.

In 1999 I was invited by Que publishing to write a book to be entitled *The Complete Idiot's Guide to MP3: Music on the Internet*. Que was, at the time, one of the largest publishers in the world. The resulting book was co written by Nat Gertler, a technology author who had already written several books in the Complete Idiot's Guide series. Mr. Gertler's contribution was to ensure that the resulting book was written in the "Complete Idiot's Guide" style which meant the book was to be light and breezy in nature, but ultimately informative. It was my burden to research and then write the technological and business related issues that would comprise the subject matter of the book.

The above mentioned book was published in September of 1999. My research and writing of the book took place about six months before the publication date. The book was published in the United States and abroad and released in English, French, Spanish and Polish versions.

As previously mentioned, I addressed AMP3.com and their unique business model, which I felt was novel in nature and potentially ground breaking at the time. In part, I wrote the following: *"AMP3 seems to have taken a cue from commercial radio. At AMP3.com, you can download free music from hundreds of bands. And that's not all! In addition to the free music, there's something else you get for free. Advertising. That's right, attached to each song is a short little ad clip, just a few seconds long. Every time you play the MP3, you'll hear a little jingle for some sponsor."*

I also added the following: ... *"AMP3.com hopes to provide you with better music because of the ads. Every time that someone downloads a song with an ad in it, the advertiser pays AMP3.com money."*

It was clear to MP3.com that AMP3.com had launched a business model whereby their content providers, musicians who placed MP3 formatted songs on the AMP3.com site, would receive revenue which was derived from commercials paid for by advertisers. Given my responsibility to MP3.com to continue to develop additional revenue models, I also continued to consider the pros and cons of providing embedded advertising along the lines of the AMP3.com approach.

While the AMP3.com commercial model was intriguing, I finally concluded that the time was not right for MP3.com to follow suit and as I wrote in the above mentioned book: *"getting this arrangement fully working and profitable is a long-term goal for AMP3, they don't have everything going quite as well as they probably hope to."*

Novel ideas, such as AMP3.com's commercial embedding program, sometimes do not initially generate as much income as their creators would hope. However, we respected AMP3.com's innovation at the time and their willingness to embrace novel and inventive business model concepts so as to address the industry's deeply-felt need for new revenue streams. We also agreed internally at the CEO level, that AMP3.com been the first to embrace what in hindsight was inevitable: commercials would be a part of the Internet user's daily experience when the content provided could sustain the appearance of those commercials. Just as millions of people tolerate commercial interruptions while they watch *Late Night with David Letterman* on television, we knew that millions would tolerate a

it had been constructed. Once such systems had been operational for approximately six months, I would prepare a procedural manual and hand off operating responsibility to a manager.

Also, in 1999, I co-wrote the book entitled *The Complete Idiot's Guide to MP3: Music on the Internet*. I conducted extensive research of the Internet music landscape at that time and wrote on the technological and business related issues that would comprise the subject matter of the book.

My activities necessarily involved thinking about the future and making predictions. In the intervening years I have sometimes been called a "futurist" and have enjoyed some degree of accuracy in my predictions of overall industry trends. My business model expertise continues to be sought by start-ups and venture capitalists to this day.

### **Statements**

When MP3.com was founded in 1998, the Internet was still very much in its infancy. Our initial struggle with MP3.com surrounded the creation of sustainable revenue models. Certain Internet based businesses had received millions of dollars of venture or investment funds without having developed clearly defined, reliable business models. Even in 1998, MP3.com was noticing that some well-funded Internet companies were showing signs of financial illness.

AMP3.com and MP3.com shared the same essential structure, both were music related sites that were built upon libraries of digital music made available for downloading, and both companies were seeking ways to develop dependable revenue streams.

I became aware of AMP3.com shortly after the launch of their website in February 1999. I contacted Michael Sharp, the owner of the AMP3.com website, and spoke with him on at least one occasion near the time where he opened up his MP3-related business. This contact occurred during my tenure at MP3.com.

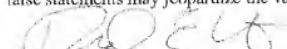
I spent a considerable amount of effort studying AMP3.com's business model in order to ascertain if AMP3.com posed any real threat to MP3.com. My analysis of AMP3.com initially took place in 1999 and AMP3.com's unique business model was the subject of considerable discussion at the CEO level within MP3.com. We were aware that AMP3.com had instituted a system by which commercial advertisements were inserted as a part of a MP3 file, so that the person who downloaded the song would also at the same time be downloading an audio commercial. We had not previously contemplated such a business model, and we were a bit concerned that this novel approach could generate substantial income for our competitor.

My personal consultations with our CEO regarding this subject resulted in our internal agreement that AMP3.com did not pose any real threat to MP3.com due to the fact that they appeared to be underfunded. However, we were intrigued with the business model of providing commercial advertisements with downloaded songs. To the best of our knowledge no such model had previously been attempted, but in hindsight, it struck us as inevitable. Our CEO's opinion, which I shared, was that commercial advertisements of that nature would eventually become ubiquitous. We considered the AMP3.com approach of embedded commercials tied with downloaded media to be the "wave of the future" and as such, we concluded that such embedded commercials would ultimately be commonplace and accepted by the public in the same manner that the public accepts commercials on standard television.

In 1999, MP3.com did not feel that the circumstances were ripe for embedding advertisements in download files, and MP3.com's financial circumstances were such that we did not feel pressured to

short commercial as a tradeoff to obtain free high quality downloaded entertainment -- It would simply be a matter of time.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.



Rod Underhill



Date